In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA, *Complainant,*
vs.
STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants,*
UNITED STATES OF AMERICA, *Intervener,*
STATE OF NEVADA, *Intervener,*
STATE OF NEW MEXICO, *Impleaded,*
STATE OF UTAH, *Impleaded.*

REPLY BRIEF FOR THE STATE OF NEVADA, Intervener

ROGER D. FOLEY
Attorney General
Carson City, Nevada

W. T. MATHEWS
Chief Counsel
331 Gazette Building, Reno, Nevada

R. P. PARRY

CLIFFORD E. FIX

PARRY, ROBERTSON & DALY
Special Counsel
Fidelity Bank Building, Twin Falls, Idaho
Counsel for the State of Nevada.

September 27, 1961

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants,*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener,*

STATE OF NEW MEXICO, *Impleaded,*

STATE OF UTAH, *Impleaded.*

REPLY BRIEF FOR THE STATE OF NEVADA, Intervener

ROGER D. FOLEY
Attorney General
Carson City, Nevada

W. T. MATHEWS
Chief Counsel
331 Gazette Building, Reno, Nevada

R. P. PARRY

CLIFFORD E. FIX

PARRY, ROBERTSON & DALY
Special Counsel
Fidelity Bank Building, Twin Falls, Idaho

Counsel for the State of Nevada.

September 27, 1961

SUBJECT INDEX

	PAGE
SUMMARY OF ARGUMENT	6–9
ARGUMENT	10–29
I. Nevada's Exceptions to the Master's Report	10–11
II. Issues Between Nevada and the United States	12–15
III. Comments on California's Answering Brief	16–29
CONCLUSION	30

TABLE OF CASES

	PAGE
Connecticut v. Massachusetts, 282 U.S. 660 (1931)	28
Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938)	21, 27, 28
Kansas v. Colorado, 206 U.S. 46 (1907); 185 U.S. 146 (1902)	21, 28
Nebraska v. Wyoming 325 U.S. 589 (1945)	21, 24, 28
New Jersey v. New York, 283 U.S. 336 (1931)	23, 28
United States v. Tilley, 124 F.2d 850, (C.C.A. 1941) cert. den. 316 U.S. 691 (1942)	24

STATUTES

	PAGE
Boulder Canyon Project Act, 45 Stat. 457, 43 U.S.C. 617	7, 8, 12, 13, 14, 19, 20, 23, 25, 26, 27, 30
California Limitation Act, Act of March 4, 1929; Ch. 16, 48 Session; Statutes and Amendments to the Codes, 1929, pp. 38–39	20
Nevada Revised Statutes, NRS 533.010 and NRS 533.325	14

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA, *Complainant,*
vs.
STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants,*
UNITED STATES OF AMERICA, *Intervener,*
STATE OF NEVADA, *Intervener,*
STATE OF NEW MEXICO, *Impleaded,*
STATE OF UTAH, *Impleaded.*

REPLY BRIEF FOR THE STATE OF NEVADA, Intervener

REPLY BRIEF FOR THE STATE OF NEVADA

Since the respective contentions of the United States and the States of Arizona, California and Nevada and the respective answers thereto have been stated and re-stated in the Opening and Answering Briefs, Nevada believes that a Reply Brief in the usual sense is unnecessary. Neither the United States, Arizona nor California urge any contentions or raise any issues in their

Answering Briefs to which Nevada has not already answered either in her Opening Brief or in her Answering Brief.

Accordingly, this Reply Brief, with few exceptions, will be confined, for the Court's convenience, to a summary of the issues and Nevada's position thereon.

SUMMARY OF ARGUMENT

I.

By her first Exception, Nevada asks that the final decree herein be clear and definite that the Colorado River Commission of Nevada is the proper entity to contract for Lake Mead storage and that further subcontracts with individual users are not required. By her second Exception, she requests that because of the relatively small quantity of water awarded her and because of the fact that substantially all of it will be used for domestic and municipal purposes, that the decree provide that Nevada need not contribute to present perfected rights in other States in short water years or that there be a minimum of 250,000 acre-feet annually below which her rights shall not be cut. Nevada's uses are not the type which can be altered and changed in short water years in the way that the irrigation uses can be altered in the case of the principal users in Arizona and California, neither of whom have objected to this request by Nevada. By her third Exception, Nevada asks that because of a possible conflict of interest among entities under the Secretary of the Interior, that an independent Commissioner under the control of this Court be appointed to hereafter control the operation of the Colorado River in the Lower Basin and the delivery of water therefrom. By her fourth Exception, Nevada requests that whatever official operates the Colorado River under the decree herein shall be required to promulgate detailed Rules and Regulations concerning the manner, method and plan of operation.

II.

The United States has not presented any argument seriously challenging that the Special Master was in error in holding that the provision in Article 5(a) of the Nevada contract with the United States (and a similar provision of the Arizona contract) providing that her allocation should be reduced by upstream tributary uses was invalid. On the contrary, as pointed out in detail in the Master's Report, such a provision is contrary to Sections 5 and 18 of the Boulder Canyon Project Act and is inconsistent with the provisions of Section 4(a) of the same Act limiting California's use of water. The legislative history of that Act clearly demonstrates that Nevada should be entitled to 300,000 acre-feet of Lake Mead storage and there was never the slightest hint that this should be diminished by her upstream tributary uses.

There is likewise no merit in the contention of the United States that in addition to the existing contracts with the Colorado River Commission of Nevada, the statutorily designated agent of the State, there should be other contracts with individual users. This Commission is a legal entity. The Nevada contracts provide throughout that deliveries of water shall be made to, be controlled by, and be paid for by the State; in fact, the whole contract is definitely a contract between the United States and the State. This is entirely different from the Arizona contract which, by its terms, provides for individual contracts with separate users and contains no provisions for deliveries of water to, or payments from the State.

III.

California's repetitious argument as to an unconscionable shortage in the supply available to her is based on invalid assumptions and somewhat tricky arithmetic. She tries to convert the limit of 4,400,000 acre-feet of water annually imposed on her by the

Project Act and her own statute into a guarantee of that amount. Neither the United States nor any of the other sovereign States ever guaranteed her any amount. Her assumptions as to water supply are incorrect because she overlooks the fact that the total tributary supply in the Lower Basin is not subject to control by the Upper Basin and the amount provided by nature from that source will always be available, together with 7,500,000 acre-feet average annually at Lee Ferry from the Upper Basin. The Upper Basin must release water not required for domestic and agricultural uses when needed in the Lower Basin and the Upper Basin use under existing and authorized projects will not exceed 3,840,000 acre-feet per annum. The only time the 8,500,000 acre-feet of Lower Basin depletion becomes critical would be whenever it became necessary to compute the contributions of the two Basins to the Mexican supply. At that time, the controlling figure would be the total Lower Basin beneficial consumptive use, computed at the lower-most dam in the United States (Imperial Dam), and this would not necessarily be the arithmetic total of the separate beneficial consumptive uses. California's shortage argument is not persuasive.

IV.

Nevada concurs with the United States that the Master's interpretation of Section 4(a) of the Project Act is correct and that it created a contractual allocation scheme which has been properly carried out by the Secretary of the Interior in the contracts he has made for Lake Mead storage water. The Recommended Decree is entirely proper on this theory. But, in addition to this, if it should be determined that, contrary to the Master's Report, the Court should make an equitable apportionment of the Colorado River mainstream water, a decree substantially identical with that recommended by the Master would be proper.

The United States, having taken control of all of the waters of this navigable river at Lake Mead, has prior and superior rights thereto. All former natural-flow rights in California were converted into contract rights for such storage. No independent natural-flow rights have been recognized in any way since the completion of Hoover Dam.

In any allocation the *res* must be the storage water in Lake Mead. The existing contracts are valid in every way. The Colorado River is unique as compared with all other prior equitable apportionment suits because here storage water must be apportioned. Consequently, the contracts have the same characteristics and standings as the Court has found appropriation rights to have in other equitable apportionment suits. An award of 2,800,000 acre-feet to Arizona, 4,400,000 acre-feet to California and 300,000 acre-feet to Nevada, out of the first 7,500,000 acre-feet of mainstream water, is in accordance with the contracts and meets every test of an equitable apportionment suit. This is particularly true because the Recommended Decree provides for those rights which were "present perfected rights" on June 25, 1929. It also requires contributions to fill them from other States in short water years, along with a general provision for proration of the supply in such years. Even if we concede, *arguendo*, that there must be an equitable apportionment as California contends, the decree herein complies with every rule that has been established by prior decisions as to such apportionment and should be upheld.

V.

Nevada is entitled to a decree awarding her the right to the beneficial consumptive use of 300,000 acre-feet of Lake Mead storage annually, undiminished by her upstream tributary uses, under any theory that may be adopted in the decision of this case.

ARGUMENT

I. NEVADA'S EXCEPTIONS TO THE MASTER'S REPORT

Nevada filed only four Exceptions to the Master's Report and Recommended Decree, all of which are more or less of a perfecting nature.

Exception I requests apt language in the final decree herein to make it clear that in Nevada the basic contract with the State, acting through the Colorado River Commission of Nevada, is sufficient and that additional subcontracts between the Secretary of the Interior (hereinafter Secretary) and the actual users are not necessary. The Special Master points out in his Report (page 210) that the Nevada contract, different from that of Arizona, does not require such subcontracts. Nevada's argument in support of this Exception appears at pages 52–55 of her Opening Brief. The United States takes issue with Nevada on this point. This will be commented upon later, *infra*, pp. 13–15.

Exception II requests that the provisions of the Recommended Decree be amended to provide that no part of Nevada's allocation of water be used to supply so-called "present perfected rights" in Arizona and California in years when the allocations of such States are not sufficient to supply such rights. Or in the alternative, Nevada asks that a minimum figure (she suggests 250,000 acre-feet) be fixed below which Nevada's allocations should not be reduced to make contribution to others. This is necessary because the principal uses of Nevada will be domestic uses and industrial uses in the nature of the sustenance of life and the continuation of business. They are not of the nature that can be temporarily suspended in years of short supply. Nor does Nevada have any large quantity of perfected rights on the mainstream. On the other hand, the two other States, each of whom have large quantities of perfected rights use the major portion of their water for irrigation use, a type of use which can be reduced

or even suspended in short water years. Nevada's argument in support of this Exception appears at pages 56–58 of her Opening Brief.

Neither the United States, Arizona nor California, in their Answering Briefs, challenged the correctness of Nevada's position on this point. California's only comment (Answering Brief, page 31) is that since Nevada takes this position (to which California does not disagree), Nevada assumes the existence of shortage. This inference is unwarranted.

Exception III requests that the Court appoint a Commissioner with power to supervise the operation of the Colorado River in the Lower Basin and to control the delivery of the waters thereof. The Master recommends that these duties be imposed upon the Secretary. Nevada believes that it is more just and equitable to have such an independent Commissioner, subject to the control of this Court. The Secretary operates in many capacities and there is much chance of a conflict of interest between the proprietary water demands of the many agencies under him and those of other water users. This would not seem to be a desirable situation.

Exception IV requests that the Decree provide that whichever official is given the management and control of the Lower Colorado River he be required to promulgate Rules and Regulations setting forth in detail the manner, method and plan that will be followed in operating the river in determining annual allocations and scheduling deliveries. Absent a set of Rules and Regulations such as this, the various water users would be left in constant uncertainty and there would be an invitation to unnecessary controversy.

Nevada's argument in support of these Exceptions appears at pages 59–61 of her Opening Brief. Neither the United States, Arizona nor California take issue with Nevada in respect to these two requests. In fact, California, in her briefs before the Master, made a similar recommendation.

II. ISSUES BETWEEN NEVADA AND THE UNITED STATES

There are two specific issues between Nevada and the United States. The Master found in his Report at pages 237–247 that the provision in Article 5(a) of the amended Nevada contract (Report, p. 420) with the United States (and a similar Article 7(d) in the Arizona contract (Report, p. 401)) providing that her allocation of 300,000 acre-feet of water from the mainstream should be reduced by deducting therefrom the amount of her upstream tributary uses, was invalid and void. Nevada and Arizona agree with the Special Master. The United States disagrees.

Likewise, Nevada contends, and the Master has found in his Report (page 210), that the contract between the United States and the Colorado River Commission of Nevada, a statutorily created entity of the State of Nevada created for the express purpose of contracting for, receiving, paying for and controlling the distribution of all Colorado River water to which Nevada is entitled, is sufficient and that additional subcontracts between the Secretary and the individual users, such as is required in the Arizona contract, are unnecessary. The United States disagrees.

Nevada's argument on these issues is found at pages 48–49, 52–55 of her Opening Brief and pages 49–61 of her Answering Brief.

In brief summary, on the first issue, the Master advances three principal reasons why that provision in Article 5(a) of the amended Nevada contract, and Article 7(d) of the Arizona contract, charging tributary uses, are in violation of the Boulder Canyon Project Act[1] (hereinafter Project Act) and are unenforceable (Report, pages 237–247).

---

[1] 45 Stat. 457, 43 U.S.C. 617.

(1) Since Section 5 of the Project Act requires contracts for permanent service, the contract provision referred to above would be in violation of this section.

(2) These contract provisions also violate Section 18 of the Project Act which provides, in effect, that State law shall govern water rights and priorities intra-state, and

(3) These contract provisions are inconsistent with the Section 4(a) limitation on California's use of mainstream water and would result in an allocation out of harmony with the California limitation, and, indeed, would defeat the basic purpose of the delivery contracts themselves.

There are reasons other than those relied upon by the Master why his decision is proper and sound. The legislative history of Section 4(a) of the Project Act demonstrates clearly that Congress intended that Nevada should have an undiminished 300,000 acre-feet of beneficial consumptive use on the mainstream. There is nothing in it even remotely suggesting that this amount should be reduced by tributary uses in Nevada above Lake Mead.

There is nothing in the Project Act that authorized, directed or permitted the Secretary to limit Nevada's allocation of water from Lake Mead by deducting therefrom tributary uses in Nevada nor could any act of any Nevada official in signing such a contract be deemed to be a waiver or release of any rights which that State, as a sovereign, possessed.[2]

There is nothing in the Brief of the United States which seriously challenges the soundness and correctness of the Master's decision on this point.

On the second issue, the Nevada contract is entirely consistent

---

[2]Pertinent also is Arizona's Argument on this point (pages 152–162, Answering Brief) in which Nevada fully concurs.

with Section 5 of the Project Act. Nevada is a "person"[3] as used in that section and therefore entitled to have the use of the water contracted for. The Nevada contract was drafted in the light of circumstances peculiar to Nevada. Existing and future uses will be for industrial and municipal use. It would be ridiculous to require individual and duplicate contracts for each industrial and municipal user of Lake Mead water. It is logical and sensible that the water delivery contracts be with the State of Nevada, acting through its Colorado River Commission of Nevada, an entity created by law specifically for this purpose.

Additionally, it should be added, as the Master points out (Report, page 210), that the Nevada contract is distinctly different from the Arizona contract.

With respect to the delivery of water by the United States, the Arizona contract provides (Article 7(a)) that "the United States shall deliver, and Arizona, *or agencies or water users therein*, will accept * * *."

The Nevada contract provides (Article 4(a)) that "the United States *shall deliver to the State* * * *."

Also, Article 5(a) provides "water agreed to be delivered to the State * * *." Article 6 provides "the State shall receive the water * * *."

Article 7(1) of the Arizona contract provides:

> "Delivery of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political sub-divisions therein of Arizona *as may contract therefor with the Secretary*."

---

[3]The United States and Nevada are defined as "persons" in Nevada Revised Statutes governing the appropriation and beneficial use of waters within the State. NRS 533.010 and NRS 533.325.

The Nevada contract does not contain this provision or anything comparable to it.

Also, with respect to the charges for the delivery of water, Article 9 of the Arizona contract provides:

> "A charge of 50 cents per acre shall be made for all water actually diverted from Lake Mead during the Boulder Dam cost repayment period, *which said charge shall be paid by the users of such water.*"

Also in the same Article, it provides:

> "Charges for the storage or delivery of water diverted at a point or points below Boulder Dam * * * shall be as agreed upon between the Secretary *and such users* at the time of execution of contracts therefor, and shall be paid *by such users.*"

In contrast, the Nevada contract (Article 9), provides:

> "A charge of 50 cents per acre-foot shall be made for the diversion by or delivery of water to the State * * *. Charges shall be made against the State * * *."

Also, in Article 10, it provides that:

> "The State shall pay monthly for all water delivered to it hereunder * * *."

Also, Article 8 provides that the State "shall make full and complete written monthly reports," and Article 11 provides that "all deliveries to the State shall be refused in the event of default."

The Arizona contract does not contain comparable provisions.

There is nothing in the briefs of the United States that challenges the correctness of the Master's decision (page 210), "that the Nevada contract, unlike the Arizona contract, does not require additional subcontracts between each water user and the Secretary of the Interior."

III. COMMENTS ON CALIFORNIA'S ANSWERING BRIEF

A large portion of California's Answering Brief is devoted to arguing, over and over again, that there is something inherently wrong in the Master's Recommended Decree because, as she says, it creates "a built-in shortage." There are several assumptions used in California's argument which are not valid. The conclusions reached are as erroneous as these assumptions.

One of these is the implied assumption that in some way she was *guaranteed* 4,400,000 acre-feet every year. But the fact is that she was not guaranteed any amount of water whatsoever. Her rights at all times had been, and must of necessity always continue to be, dependent upon the presence of the necessary amount of water in the stream. Likewise, they had been at all times, and must now be, considered to be subject to the rights of the other two sovereign Lower Basin States, as and when their equitable shares had been determined. California had not always had 4,400,000 acre-feet of water annually available prior to the construction of Hoover Dam. Although in our opinion she greatly exaggerates the case, there may be times in the future when she may not get that amount although, as the Master pointed out in detail, this seems highly unlikely. No one by any Compact, statute, or any other document has guaranteed that amount of water to California every year. Certainly Arizona and Nevada must not be considered to have placed themselves in the status of second-class States and to have agreed to surrender water which they might otherwise be entitled to use, in order to always keep a full 4,400,000 acre-feet of water annually available to California. It is only an act of legerdemain to attempt to convert the *limit*, which was placed on California to prevent her from taking an undue amount of water, into a *guarantee* that no matter how short the supply she would always have that amount. The guarantee of her present perfected rights, which were in the order of

3,010,827 acre-feet (Appendix III, Nevada's Opening Brief, page 110), gives California the maximum protection which she could ask of a Court in this regard. The additional requirement that the other States must contribute from their share, if necessary, to supply this amount gives her as great security as she could ask for under any theory.

Another unsupportable assumption is the frequently repeated statement that the three Lower Basin States are going to be limited to 6,500,000 acre-feet of mainstream water (beneficial consumptive use). California arrives at this figure by some tricky arithmetic. She assumes a total water supply in the whole Lower Basin System of 8,500,000 acre-feet (exclusive of Mexican delivery) and then by deducting assumed tributary uses of 2,000,000 acre-feet, arrives, in sort of a backward manner, at a mainstream supply of 6,500,000 acre-feet. This is a purely synthetic figure, one that in all probability will seldom, if ever, occur. The actual physical facts are that there will always be available the total of (1) the actual tributary flows and (2) the amount of water passing Lee Ferry, *giving effect to all of the provisions of the Compact and the reasonably foreseeable upstream uses.*

The flow in the tributaries joining the Colorado River below Lake Mead cannot, of course, be reduced by the upstream States in any way, nor by the Secretary or any other official. The tributary flow will always be there in the Lower Basin. The total of this tributary flow will not be limited by the total beneficial consumptive use—and in most years will exceed that amount. Additionally, regardless of the development in the Upper Basin, under the provisions of Article III(d) of the Compact there will always be available in the mainstream at Lee Ferry an annual average of 7,500,000 acre-feet (derived from the 10-year guaranteed total of 75,000,000 acre-feet therein provided for). California has indicated this combination of flows in her quotation

from the answers of Honorable Herbert Hoover to questions submitted to him by the then Representative Hayden (Footnote 6, page 81, California's Answering Brief).

Also, the Upper Basin is required by Article III(e) of the Compact not to withhold water not reasonably required for "domestic and agricultural uses."[4] The Master noted (Report, page 115) that to date the Lee Ferry depletion under existing and presently authorized projects would not exceed 3,840,000 acre-feet per annum. And as he points out, the possibility of there being sufficient upstream depletion to reduce the mainstream flow to the figure assumed by California in her frantic argument is so remote as to be improbable. Actually, in practical effect, and taking the above-mentioned factors into account, the total of 8,500,000 acre-feet of consumptive use on the combined mainstream and tributaries will probably only be needed to be taken into account in determining the relative contributions of the two Basins to the Mexican supply, if that problem is ever reached.

It should be further noticed that if and whenever the issue is raised between the two Basins, as to whether the Lower Basin is exceeding the beneficial consumptive use awarded it, that the question will be what is the *total* Lower Basin beneficial consumptive use. As mentioned above, since this will most likely come into play, if ever, in determining contributions to the Mexican supply, the place where this total Lower Basin use should be determined is at Imperial Dam, the lowest point of diversion for use in the United States. This total use will not necessarily

---

[4]Article III(e) provides: "The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

be the sum of the various separate uses in the Lower Basin. Because of the salvage of river losses in the Lower Basin and many other factors, the net total Lower Basin depletion measured at Imperial Dam will undoubtedly be less than the arithmetic total of the separate beneficial consumptive uses. This is particularly true with respect to diversions from the mainstream. This is another factor of error in California's bland assumption that there will only be 6,500,000 acre-feet of beneficial use available for the three Lower Basin States out of the mainstream below Lake Mead.

To test the legal correctness of the Master's Recommended Decree by the assumptions and arithmetic continuously used by California is fallacious.

Regardless, however, of the correctness or incorrectness of California's water computations, the basic fact remains that the Court must, in this action, decree an allocation of water among the Lower Basin States. The specific water to be so allocated is, of course, the water stored in Lake Mead. Nevada urges that the allocation of this water must be consistent with Section 4(a) of the Project Act. As has been mentioned in Nevada's Opening Brief, whatever else may be derived from the legislative history, the one point which stands out as crystal clear is that the members of Congress thought that, by Section 4(a) of the Project Act, they were determining the relative shares of the three Lower Basin States in and to 7,500,000 acre-feet of mainstream water. It is important, in view of the argument in California's Answering Brief, to point out that neither this section of the Act nor any of the debates indicate any intention to guarantee that the stream would flow this quantity. At the most, the members of Congress assumed that it was reasonable to expect that there would be 7,500,000 acre-feet annually available, and the record to date

indicates that this is, and for a long time in the future will be, a reasonable assumption. Accordingly, Nevada believes that a determination of this action upon an interpretation of Section 4(a) of the Project Act is proper.

Nevada concurs with the United States in the position that the interpretation of Section 4(a) arrived at by the Master is logical and proper. Certainly, none of the opposing parties have been able to select and designate from the great mass of legislative history any conclusive and positive evidence that destroys the Master's interpretation, or that conclusively supports a different or contrary interpretation.

While most of the parties now support the proposition that so-called III(b) water is surplus or excess, it is Nevada's position that the determination of this point is inseparably connected with the determination of other questions as to whether Section 4(a) and the California Limitation Act[5] are deemed to apply to mainstream water or system water. If the Master's solution is followed and it is deemed that only mainstream water has been allocated by the Secretary's contracts, then there is no vice in describing all or any part of the million acre-feet of III(b) water in the mainstream as excess or surplus, which shall go one-half to California and one-half to Arizona (less only 4 percent thereof for Nevada). But if the determination of this question is otherwise, and it is held that Section 4(a) and the Limitation Act apply to the waters of the entire system, then it is illogical and improper to consider the III(b) water as other than apportioned water, and it cannot be classified as excess or surplus water. Inasmuch as Nevada accepted the Master's decision on the basic question, she did not specifically except to his finding that III(b) water was excess or surplus. Nevertheless, this basic question is

---

[5]Act of March 4, 1929; ch. 16, 48th Session; Statutes and Amendments to the Codes, 1929, pp. 38–39.

an integral part of this case and the classification of the III(b) water must be consistent with the determination of whether we are talking about mainstream water or system water.

However, the basic issue in the case is whether allocation of the waters of the river as made by the Special Master's Recommended Decree should be upheld. Nevada states again that this allocation, based upon the secretarial contracts, should be sustained for the reasons given in the Master's Report. But, the basic allocation determined by him need not necessarily rest solely upon the theory announced by the Master.

For it seems to Nevada that an allocation of Colorado River water among the Lower Basin States, identical with that recommended by the Special Master, can be upheld without the necessity of determining many of the questions voluminously discussed in the briefs herein.

California urges strenuously that there must be an equitable apportionment of the waters of the Colorado River among the Lower Basin States. As Nevada has mentioned in prior briefs herein (Opening Brief, page 49; Answering Brief, pages 23, 41–43), as this proposition is presented by California, she only gives lip service to this theory. What is really proposed is that there be an adjudication of mainstream water rights on a priority basis so as to in effect award the major share of the water to California. But if the matter is approached on the basis of making a true equitable apportionment of the mainstream waters among these three sovereign States using established principles and factors (*Nebraska* v. *Wyoming*, 325 U.S. 580, 618; *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Kansas* v. *Colorado*, 206 U.S. 461 (1907) 185 U.S. 146 (1902), what do we find?

First, we find that the Congress has authorized and the United States has built Hoover Dam and Lake Mead Reservoir and

the accompanying complex of downstream dams and has taken physical control of all the water of the main Colorado River from Lake Mead to the Mexican Border. This being a navigable stream, and the basic dam and reservoir having been built specifically in connection with the control of navigation, there was and could be no right on the river which, under the previous decisions of this Court, could have priority over the water rights appurtenant to these reservoirs and structures. Accordingly, all of California's argument as to private rights fails.

If the Court should consider an equitable apportionment of the Colorado River waters among the three sovereign States of the Lower Basin, the factual situation is distinctly and controllingly different from that which existed in other equitable apportionment suits which have been decided by this Court. In these prior cases, there have been no overriding superior storage rights in the Federal Government such as exists here. On the contrary, there was presented and decided only the rights of the contesting States to the natural flow, and only rights evidenced by private appropriations made under State law.

In this connection, it should be noted that appropriations made under the law of any specific State cannot be considered as invading the portion of the water of any interstate stream which may then or thereafter be equitably apportioned to another State. At best, the appropriations under State law can only have full binding force and effect as among the claimants to that body of water to which their parent sovereign State is entitled. In the absence of a division between States by a Compact (and there is admittedly none here) the apportionment of the waters among sovereign States in the final analysis is a judicial function. This has been the basic position of Nevada from the commencement of this action.

The basic function of this litigation is to arrive at an apportionment of Colorado River water.[6] If this Court should decide to consider this as a suit to equitably apportion the waters of the Colorado River, we find a situation where the United States has taken into its control all of the waters of the main Colorado River reaching Lake Mead as well as other waters entering the mainstream between that point and the Mexican Border.

We also find in existence contracts made by the Secretary of the Interior with the States of Arizona and Nevada and with the various California entities claiming the rights to divert the waters of the Colorado River. No question as to either the existence or validity of these contracts is raised by any party. There can be no question but that under the Project Act the Secretary was directed to make such contracts. And the Congress provided a positive prohibition against delivering water except by and under such contracts. Under this state of facts, could any court in an

---

[6]"We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. *Connecticut* v. *Massachusetts*, 282 U.S. 660, 51 S.Ct. 286. Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereignties bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. * * * Both States have real and substantial interests in the River that must be reconciled as best they may. The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas." *New Jersey* v. *New York*, 283 U.S. 336, 342.

equitable apportionment suit ignore the existence of these contracts or the rights of the parties thereunder?

In this case, these contracts have a standing and a function comparable to those appropriations made under State law which were recognized in cases such as *Nebraska* v. *Wyoming*, *supra*. It is under these contracts that all water deliveries have been made from the Colorado River since the advent of Hoover Dam and Lake Mead on the stream. Since that time, the Secretary has had complete control of the operation and management of all structures on the river starting with Hoover Dam and continuing on down to Imperial Dam, the last structure in the United States above the Mexican boundary. The Secretary, through his agents, has made all determinations and performed all functions relating to the storage, release from storage and diversion of Colorado River water during this period.

Here it might be parenthetically noted that contrary to the argument advanced by California (Answering Brief, page 114), the actual practice on the river during this period of nearly three decades has *not* been one of recognizing that any of the California parties had retained appropriative rights in the natural flow of the Colorado River which were unaffected by the rights of the United States resulting from the construction of Hoover Dam. On the contrary, the actual practice during this period is that all water deliveries *have been treated as deliveries of storage water* under and pursuant to contracts.

To this extent, the practice on the Colorado River has been contrary to that customary on other western rivers. The usual practice is similar to that indicated as existing on the North Platte River in *United States* v. *Tilley*, 124 F.2d 850 (C.C.A. 1941), cert. den. 316 U.S. 691 (1942). Namely, that after the construction of federally built reservoirs, those operating the stream have continued to recognize pre-existing appropriative rights to

the natural flow and to deliver water thereunder, and have stored in the reservoirs only surplus water over and above that required to fill the prior natural flow rights. This stored water has been delivered in addition to and as a supplement to these pre-existing normal flow rights. Here on the Colorado, the practice has been exactly to the contrary of this customary western practice. There is not an iota of evidence in the record that after the construction of Hoover Dam those in control of the river have ever at any time recognized that the pre-existing rights to the normal flow were still in existence. No such water has been allowed to flow through Lake Mead and past Hoover Dam, as unstorable water. Nor has there ever been any attempted measurement of water diverted into California canals as natural-flow water as distinguished from storage water. Nor have any separate river records been kept as to natural-flow diversions and supplemental storage-water diversions. On the contrary, *all water* which has been diverted into the California canals has been treated as storage water and as deliveries under the contracts. There is nothing in the evidence to indicate that California has ever objected to this procedure. To now assert the continued and continuing existence of those normal-flow rights, which were being diverted into her State prior to the construction of Hoover Dam, is of no avail. Against the paramount and superior rights which the United States has to take control of, store, and deliver, in accordance with authorized contracts, all of the waters of the river, the rights have long disappeared.

In the light of all of these circumstances, if the Court should determine to lay aside the troublesome question of interpreting Section 4(a) and instead treat this action as being one for equitable apportionment of the Colorado River waters, a decree substantially identical with that recommended by the Master would still be proper. Since the decree, in conformity with the

provisions of the Compact and the Project Act protects "present perfected rights" as of June 25, 1929, the same result is obtained as though existing appropriative priorities had been protected, as in the other equitable apportionment suits. And since the decree further provides that these perfected rights should be filled even if it was necessary, in time of shortages, to take water from the allotments of the other States, a similar result is reached here as was obtained in former cases by recognizing appropriative priorities in their chronological order regardless of State lines. The Recommended Decree meets all requirements in these respects.

Storage water must be allocated in this suit since that is in reality the only water supply available. By recognizing the contracts which, as we have noted heretofore, have the same characteristics as appropriative priorities on other streams, the Recommended Decree makes a true allocation among the States of the Lower Basin. If this allocation is decreed by this Court as an equitable apportionment, then it would seem the question as to whether Congress intended that the Secretary of the Interior should make interstate allocations, or whether the delegation of authority to do so is constitutional, and the question as to whether or not the Secretary's allocation is in conformity with the statute all become moot.

For we find in actual existence a contract providing for the use of storage water up to 2,800,000 acre-feet in Arizona, and another contract providing for the use of 300,000 acre-feet in Nevada. Collectively, the contracts with individual California water users provide for 5,362,000 acre-feet of storage. However, as a condition precedent to the passage of the Act to authorize the construction of great Hoover Dam and the All-American Canal, principally for her benefit, California had agreed that she would be limited to 4,400,000 acre-feet out of the first 7,500,000

acre-feet. If this Court apportions the water of the mainstream so that 2,800,000 acre-feet is awarded to Arizona, 4,400,000 acre-feet to California and 300,000 acre-feet to Nevada, in the exercise of its judicial power, all of the substantive rights of the parties will be protected. And the decree will be in harmony with the pattern followed in past equitable apportionment suits.

Additional support to the proposition that a decree founded upon the rules of equitable apportionment is proper here is the fact that even though the Master characterized his decree as being based upon a statutory contractual allocation, he still found it necessary to base it *in part* upon a theory identical with equitable apportionment. This he did when he provided that in years of shortage the supply should be prorated among the three Lower Basin States in the same proportion as he found their rights to be under their contracts. But beyond question it must be conceded that he found nothing in the Project Act (which he designated as the controlling document) which in any way provided for proration in times of shortage; or which provided anything whatsoever as a method of dividing water in years when there was not a full supply. The only exception to this general statement is the provision that present perfected rights should be protected. But beyond this, the question is entirely one for the Court to determine in the exercise of its judicial authority. At least subconsciously, the Master was exercising this judicial authority derived from the so-called Federal Common Law applicable to suits between States for the allocation of the waters of interstate streams when he provided for this pro-rata sharing in short years.[7] His basic

---

[7]This Court, in reversing the Colorado Supreme Court in *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, stated: "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."

finding, upon which he founded his proration determinations, to the effect that the States, as sovereigns, stood on a parity of right, is entirely sound, and likewise, in conformity with the Federal Common Law rule.

In view of the foregoing, Nevada submits that even if we concede, *arguendo*, that the California contention is correct and that there can be no determination in this case other than upon the theory of equitable apportionment by judicial decree, nevertheless the Recommended Decree is still a proper one to be entered in this action.[8] When cognizance is taken of the different factual situation that prevails on the Colorado River from that prevailing on the rivers involved in other like suits, the Decree herein is consistent with the past rulings of this Court, and with the pattern of former decrees. The particular factor, unique in this case, is the fact that the *res* necessarily has to be storage water in Lake Mead and in other downstream reservoirs. The decree, in dividing the storage water, follows all the basic rules of prior equitable apportionment decisions. No decree substantially different therefrom could be entered in this suit even if all parties were to agree that this was the proper theory for the decision. In the last analysis, the lengthy argument by California to the effect

---

[8]While the Master disclaims any reliance upon the doctrine of equitable apportionment (Report, p. 138), it may logically be argued that the Master has in effect made an apportionment of the beneficial consumptive use of the waters of the Colorado River to each of the sovereign States of Arizona, California and Nevada upon that doctrine, and has followed the principles laid down in prior decisions of this Court. *Kansas* v. *Colorado*, 206 U.S. 46 (1907), 185 U.S. 146 (1902); *Connecticut* v. *Massachusetts*, 282 U.S. 660 (1931); *New Jersey* v. *New York*, 283 U.S. 336 (1931); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938); *Nebraska* v. *Wyoming*, 325 U.S. 580 (1945).

that the decree is vastly in error because the Master ignored the theory of equitable apportionment is of no practical avail to her. The vice of the California position is her assumption that there are still in existence appropriative rights to natural-flow water when, as a matter of fact, all of them long ago were converted into contract rights for storage water. This is abetted by her further erroneous assumption that in some mysterious way she was guaranteed 4,400,000 acre-feet, come what may.

CONCLUSION

Nevada submits that the apportionment of mainstream water among the States of Arizona, California and Nevada proposed by the Master is a just and fair allocation and should be sustained.

Nevada, in her Opening Brief and in her Answering Brief, has established that the Master's proposed division of mainstream water can be sustained on any one of several legal theories. It can be sustained under the theory adopted by the Master that the provisions of the Project Act constituted a statutory contractual allocation. In the absence of the Project Act, the contracts made by the Secretary would have been valid and could be judicially sustained under the general Reclamation Law. Or if this Court should determine this case on the basis of equitable apportionment, it would be judicially proper to use the contracts made by the Secretary as a yardstick in arriving at an equitable apportionment.

There is nothing in the Answering Briefs of the United States, Arizona, or California which seriously challenges the correctness of the foregoing conclusions.

Respectfully submitted,

ROGER D. FOLEY,
Attorney General

W. T. MATHEWS,
Chief Counsel

R. P. PARRY,

CLIFFORD E. FIX,
Special Counsel

Counsel for State of Nevada.

Dated September 27, 1961